

EXHIBIT 5

NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Lyle Andersen, et al.,

Plaintiffs,

v.

DIRECTV Incorporated, et al.,

Defendants.

No. CV-14-02307-PHX-SRB

ORDER

The Court now considers Defendant DIRECTV's Motion to Dismiss Plaintiffs' First Amended Complaint ("MTD") (Doc. 36).

I. BACKGROUND

Nineteen current and former satellite installation technicians bring claims under the Fair Labor Standards Act ("FLSA") against Defendant DIRECTV based on alleged minimum wage and overtime violations. (*See* Doc. 30, First. Am. Compl. ("FAC") ¶¶ 1-216.)¹ Under what the First Amended Complaint calls a "fissured employment scheme," Plaintiffs allege that Defendant DIRECTV contracted with certain intermediary entities to hire technicians for satellite installation projects. (*Id.* ¶¶ 28-44.) Plaintiffs were paid under a "piece-rate system" for each job completed. (*Id.* ¶ 70.) Plaintiffs contend that

¹ The procedural history of this case is complicated. Plaintiffs were involved in several predecessor FLSA collective actions but filed this lawsuit after those cases were decertified or because they did not fit within the collective action subclass to proceed in the lawsuits. (*See* MTD at 3-5; Doc. 38, Pls.' Opp'n to MTD ("Opp'n") at 3-5 (summarizing procedural history and predecessor litigation).) The remaining FLSA collective actions are still pending and have not reached a merits determination.

1 under this system they were not fully paid for all hours they worked due to Defendant
2 DIRECTV's policies and practices. The policies and practices included imposing
3 chargebacks—amounts deducted from Plaintiffs' pay if there were problems with the
4 installation or if a customer did not give a certain "satisfaction rating" for the
5 installation—and not paying wages for "integral and indispensable" installation tasks
6 such as assembling satellite dishes and driving to jobs by covering only certain
7 enumerated "productive tasks . . . listed on a standardized rate card." (*Id.* ¶¶ 75-80.)
8 Plaintiffs allege they "routinely work[ed] more than forty hours in a work week while
9 being denied overtime pay and being subjected to an effective wage rate below that
10 required by applicable law." (*Id.* ¶ 84.) The First Amended Complaint estimates the
11 average number of hours each Plaintiff worked per week during their employment and
12 the reductions from chargebacks and unreimbursed business expenses. (*Id.* ¶¶ 91-204.)

13 Defendant DIRECTV moves to dismiss under Federal Rule of Civil Procedure
14 12(b)(6), arguing that (1) eight Plaintiffs have failed to plead minimum wage violations,
15 and (2) Plaintiffs' claims must be dismissed to the extent they involve alleged violations
16 outside the FLSA's two-year statute of limitations for non-willful violations. (*See* MTD
17 at 7-13.) The first argument involves minimum wage claims brought by Plaintiffs
18 Eduardo Meza, Timothy Azlin, Joshua Ondrey, John Hunsberger, George Postulka, John
19 Richards, Jr., James Young, and Ian Elmore. (*Id.* at 8.)

20 II. LEGAL STANDARDS AND ANALYSIS

21 Rule 12(b)(6) dismissal for failure to state a claim can be based on either (1) the
22 lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal
23 claim. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011), *cert. denied*,
24 *Blasquez v. Salazar*, 132 S. Ct. 1762 (2012). In determining whether an asserted claim
25 can be sustained, "[a]ll of the facts alleged in the complaint are presumed true, and the
26 pleadings are construed in the light most favorable to the nonmoving party." *Bates v.*
27 *Mortg. Elec. Registration Sys., Inc.*, 694 F.3d 1076, 1080 (9th Cir. 2012). "[A] well-
28 pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those

1 facts is improbable, and ‘that a recovery is very remote and unlikely.’” *Bell Atl. Corp. v.*
2 *Twombly*, 550 U.S. 544, 556 (2007) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236
3 (1974)). However, “for a complaint to survive a motion to dismiss, the nonconclusory
4 ‘factual content,’ and reasonable inferences from that content, must be plausibly
5 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d
6 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In other
7 words, the complaint must contain enough factual content “to raise a reasonable
8 expectation that discovery will reveal evidence” of the claim. *Twombly*, 550 U.S. at 556.

9 **A. Minimum Wage Violations**

10 “The FLSA sets a national minimum wage . . . and requires overtime pay of one
11 and a half times an employee’s hourly wage for every hour worked over 40 hours in a
12 week” *Probert v. Family Centered Servs. of Alaska, Inc.*, 651 F.3d 1007, 1009-10
13 (9th Cir. 2011) (citations omitted); *see* 29 U.S.C. § 206(a)(1) (minimum wage); 29 U.S.C.
14 § 207(a)(1) (overtime). Covered nonexempt employees are entitled to a minimum wage
15 of “not less than \$7.25 an hour” per workweek. 29 U.S.C. § 206(a)(1). Defendant
16 DIRECTV argues that Plaintiffs Azlin’s, Hunsberger’s, Meza’s, Ondrey’s, Postulka’s,
17 Richards’s, Young’s, and Elmore’s FLSA minimum wage claims fail as a matter of law
18 and must be dismissed without leave to amend because they “cannot show that their
19 weekly wages fell below the statutory minimum.” (MTD at 8.) Defendant DIRECTV
20 contends that when these Plaintiffs’ alleged wages are averaged across their alleged total
21 time worked, reductions for chargebacks, and unreimbursed expenses, each of these
22 Plaintiffs was paid the minimum wage. (*Id.* at 9.)² Defendant DIRECTV therefore argues
23 that the minimum wage claims are possible, but they do not rise beyond the speculative
24 level. (*Id.* at 10.) Defendant DIRECTV’s calculations are based on the following
25 allegations:

26 Plaintiff Azlin would work an estimated 75 hours per week; he would be
27 subject to chargebacks of \$160 per week; and he would be paid \$1,000 per

28 ² It appears that Defendants did not move to dismiss the minimum wage claims of
the other Plaintiffs because their alleged wages averaged below the minimum wage.

1 week, which would be reduced by unreimbursed business expenses of \$377
2 per week. (FAC ¶ 107) (Defendants' calculation: \$8.31 per hour wage)

3 Plaintiff Hunsberger would work an estimated 70 hours per week; he would
4 be subject to chargebacks of \$50 per week; and he would be paid \$775 per
5 week, which would be reduced by unreimbursed business expenses of \$195
6 per week. (*Id.* ¶ 119) (Defendants' calculation: \$8.00 per hour wage)³

7 Plaintiff Meza would work an estimated 68 hours per week; he would be
8 subject to some amount of chargebacks totaling approximately \$750 a
9 month (which equates to \$173 a week); and he would be paid \$1,000 per
10 week, which would be reduced by unreimbursed business expenses of \$245
11 per week. (*Id.* ¶¶ 136-37) (Defendants' calculation: \$11.10 per hour wage)

12 Plaintiff Ondrey would work an estimated 60 hours per week; he would be
13 subject to chargebacks of \$350 per week; and he would be paid \$1,000 per
14 week, which would be reduced by unreimbursed business expenses of \$157
15 per week. (*Id.* ¶ 155) (Defendants' calculation: \$14.05 per hour wage)

16 Plaintiff Postulka would work an estimated 60 hours per week; he would be
17 subject to chargebacks of \$100 per week; and he would be paid \$875 per
18 week which would be reduced by unreimbursed business expenses of \$355
19 per week. (*Id.* ¶ 161) (Defendants' calculation: \$8.66 per hour wage)

20 Plaintiff Richards would work an estimated 55 hours per week; he would be
21 subject to chargebacks of \$105 per week; and he would be paid \$850 per
22 week, which would be reduced by unreimbursed business expenses of \$332
23 per week. (*Id.* ¶ 167) (Defendants' calculation: \$9.42 per hour wage)

24 Plaintiff Young would work an estimated 65 hours per week; he would be
25 subject to chargebacks of \$75 per week; and he would be paid \$800 per
26 week, which would be reduced by unreimbursed business expenses of \$195
27 per week. (*Id.* ¶ 185) (Defendants' calculation: \$9.31 per hour wage)

28 Plaintiff Elmore would work an estimated 55 hours per week; he would be
subject to chargebacks of \$38 per week; and he would be paid \$875 per
week, which would be reduced by an unspecified amount of unreimbursed
business expenses. (*Id.* ¶ 203) (Defendants' calculation: \$15.91 per hour
wage)

(See MTD at 6-7, 9-10.)

Plaintiffs argue that even if the average hourly wages are above the minimum
wage, these calculations do not account for the variability each workweek in the hours
the Plaintiffs worked, the total chargeback amounts, and other unreimbursed business
expenses. (Opp'n at 6-8.) Plaintiffs could have been paid more than the minimum wage
certain workweeks but less than the minimum wage in other weeks. The Court agrees

³ Defendant DIRECTV based this calculation on a \$755 per week salary rather
than the actual \$775 per week salary listed in the First Amended Complaint. The average
per hour wage for Plaintiff Hunsberger should have been \$8.29.

1 with Plaintiffs that the allegations in the First Amended Complaint cannot be interpreted
2 to mean that Plaintiffs could never have been paid less than the minimum wage in a
3 workweek—a point Defendant DIRECTV admits in Reply. The Court disagrees that
4 Plaintiffs’ self-described “general allegations” are sufficient to state a plausible FLSA
5 claim.

6 In *Landers v. Quality Communications, Inc.*, 771 F.3d 638, 640 (9th Cir. 2014), *as*
7 *amended* (Jan. 26, 2015), *cert. denied*, No. 14-969, 2015 WL 569003 (Apr. 20, 2015), the
8 Ninth Circuit addressed the application of the *Twombly–Iqbal* pleading standards to
9 FLSA claims. The Ninth Circuit agreed with other circuit courts that had held that “[a]
10 plaintiff may establish a plausible [FLSA] claim by estimating the length of her average
11 workweek during the applicable period and the average rate at which she was paid, . . . or
12 any other facts that will permit the court to find plausibility.” *Id.* at 645. “Although
13 plaintiffs in these types of cases cannot be expected to allege ‘with mathematical
14 precision,’ the amount of . . . compensation owed by the employer, they should be able to
15 allege facts demonstrating there was at least one workweek in which they [were not fully
16 compensated].” *Id.* at 646. Under these standards, the Ninth Circuit affirmed the district
17 court’s dismissal of the plaintiff’s “generalized allegations” of minimum wage and
18 overtime violations. *Id.* The complaint included the “alleg[ation] that the defendants
19 implemented a ‘de facto piecework no overtime’ system, . . . [but it lacked] any detail
20 regarding a given workweek when [the plaintiff] worked in excess of forty hours and was
21 not paid overtime for that given workweek and/or was not paid minimum wages.” *Id.*

22 Plaintiffs do not dispute Defendant DIRECTV’s calculations that the employment
23 figures average above the minimum wage. The Court would have to speculate from
24 Plaintiffs’ employment figures that there were workweeks in which Plaintiffs did not
25 receive minimum wage because Plaintiffs have not expressly identified workweeks in
26 which they were paid below the minimum wage. Absent such factual content, Plaintiffs’
27 minimum wage claims are no different in substance to the generalized allegations the
28 Ninth Circuit concluded were insufficient to state a plausible FLSA claim in *Landers*.

1 “Although the[] allegations ‘raise the possibility’ of undercompensation in violation of
2 the FLSA, a possibility is not the same as plausibility.” *See id.* The Court dismisses
3 Plaintiffs Azlin’s, Hunsberger’s, Meza’s, Ondrey’s, Postulka’s, Richards’s, Young’s, and
4 Elmore’s FLSA minimum wage claims.

5 **B. Statute of Limitations**

6 The FLSA imposes a two year statute of limitations period for non-willful
7 violations and a three year period for willful violations. 29 U.S.C. § 255. A violation of
8 the FLSA is willful only if the employer “knew or showed reckless disregard for the
9 matter of whether its conduct was prohibited by the [FLSA].” *McLaughlin v. Richland*
10 *Shoe Co.*, 486 U.S. 128, 133 (1988). Defendant DIRECTV argues that the allegations in
11 the First Amended Complaint are insufficient to support claims for willful violations of
12 the FLSA, and therefore the claims are time barred to the extent Plaintiffs purport to
13 bring claims that accrued all or in part more than two years from when they first filed or
14 joined an action against Defendant DIRECTV. (MTD at 11-13.) The Court declines to
15 make a finding about whether the two year or three year statute of limitations period
16 applies. The type of parsing of claims that Defendant DIRECTV seeks is premature in
17 this current posture. In the motion to dismiss stage the relevant inquiry is whether a legal
18 claim has been stated, and when Defendant DIRECTV does not identify any Plaintiffs
19 that would be dismissed from the case under its statute of limitations analysis, it is
20 unnecessary to resolve such an issue at this time.

21 **III. CONCLUSION**

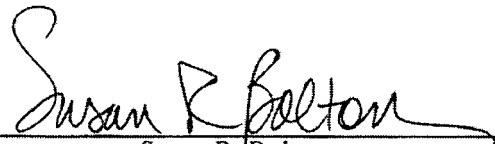
22 The Court dismisses Plaintiffs Azlin’s, Hunsberger’s, Meza’s, Ondrey’s,
23 Postulka’s, Richards’s, Young’s, and Elmore’s FLSA minimum wage claims as
24 insufficiently pled. The Court does not need to determine the applicable statute of
25 limitations period in this current posture. Plaintiffs have requested the opportunity to file
26 a motion for leave to amend the First Amended Complaint to address the deficiencies
27 identified by the Court. (Opp’n at 11.) Plaintiffs are instructed to follow the applicable
28 local and procedural rules governing amended pleadings in seeking leave to amend. *See*

1 Fed. R. Civ. P. 15; LRCiv. 15.1. Per the Rule 16 scheduling order, Plaintiffs must seek
2 leave to amend no later than thirty (30) days of the date of this Order.

3 **IT IS ORDERED** granting in part and denying in part Defendant DIRECTV's
4 Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. 36).

5 **IT IS FURTHER ORDERED** instructing Plaintiffs to follow the applicable local
6 and procedural rules governing amended pleadings in seeking leave to amend. Per the
7 Rule 16 scheduling order, Plaintiffs must seek leave to amend no later than thirty (30)
8 days of the date of this Order.

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10 Dated this 5th day of May, 2015.

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15 Susan R. Bolton
16 United States District Judge
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